

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

RLI INSURANCE COMPANY

Plaintiff,

Civil Action No. 1:14-cv-802-SSB-SKB

Vs.

Judge: Timothy Black

Magistrate Judge: Stephanie K. Bowman

FIFTH THIRD BANCORP

Defendant.

FIFTH THIRD BANCORP, et al.,

Plaintiffs,

Civil Action No. 1:14-cv-869-SSB-SKB

Vs.

Judge: Timothy Black

Magistrate Judge: Stephanie K. Bowman

**CERTAIN UNDERWRITERS AT
LLOYD'S SUBSCRIBING TO
POLICY B0509QA048710,
B0509QA051310, 81906760, et al.,**

Defendants.

**RLI'S RESPONSE TO FIFTH THIRD'S MOTION, IN THE ALTERNATIVE, TO
STRIKE THE EXPERT REPORT OF NANCY TERRILL**

RLI Insurance Company ("RLI") submits this response in opposition to Fifth Third Bancorp ("Fifth Third")'s Motion to Strike the Expert Report of Nancy Terrill and in support thereof states as follows:

1. RLI moved to strike the opinions of Brian Kelley, an expert disclosed by Fifth Third, and bar him from testifying because (1) Fifth Third failed to disclose Kelley on a timely basis – thereby depriving RLI of an opportunity to respond within the agreed schedule; and (2) Kelley offers inadmissible opinions on legal issues. (Dkts. 102 and 110).

2. In response, Fifth Third argued that it disclosed Kelley's opinion timely despite

the three-tiered schedule for expert discovery laid out in the Court's Scheduling Order (Dkt. 76) and that Kelley responds to opinions offered by Nancy Terrill, RLI's banking practices expert (though his opinions cannot, under any reasonable interpretation, be considered a bona fide response to Terrill's conclusions). (Dkt. 109).

3. In an effort to distract from the fundamental flaws in Kelley's opinions, Fifth Third asks the Court, in the event it grants RLI's motion to strike Kelley's testimony, to strike Terrill's testimony. Unlike Fifth Third, RLI timely disclosed Terrill's testimony in accordance with the Scheduling Order and duly complied with the discovery deadlines of the case. Thus, Fifth Third's failure to timely disclose Kelley's report and opinions has no impact on Terrill's opinions and Fifth Third's failure to comply with the scheduling order is not grounds to strike Terrill's timely disclosed opinions.

4. It appears that Fifth Third seeks to strike Terrill's opinions simply because Kelley responded to them. (Dkt. 107). Fifth Third in fact has no grounds to ask for the striking of Terrill's report. Its motion is a *quid pro quo* which motion wrongly assumes that Kelley's opinions must be admissible because they responded to Terrill's opinions. Fifth Third's premise, of course, ignores the substance of Terrill's opinions. Unlike Kelley, Terrill never opined on whether Ross was dishonest, the legality of his conduct or how his conduct impacted the bank. She limited her opinions to banking practice – a proper subject of expert opinion. Kelley cannot dispute her opinions on banking practice, so he uses her opinions as a Trojan horse – designed to provide a vehicle for offering legal opinions.

5. A comparison of Kelley's actual opinions to Terrill's actual opinions demonstrates a stark contrast. Kelley opines on dishonesty, while Terrill does not. Kelley opines on legality, while Terrill does not. Kelley opines on the mental impressions of Fifth Third's

employees, while Terrill did not. In short, Terrill offered admissible opinions on banking practice, whereas Kelley offered inadmissible legal opinions. Simply put, Kelley responded to Terrill's admissible opinions with inadmissible opinions. The fact that Kelley purports to respond to Terrill does not insulate his opinions from challenge or alter the conclusion that his opinions are inadmissible.

6. As set forth in RLI's motion and reply brief, Terrill properly limits her opinions to banking practices and customs, an appropriate subject of expert opinion. Under the guise of rebutting Terrill's opinions, Kelley offers inadmissible opinions, including about whether Matthew Ross acted dishonestly and the legality of his conduct. Kelley proffers his judgment, not as an expert opining on permitted topics, but as the trier of fact, or otherwise directs the trier of fact to his preferred conclusion on ultimate issues. In sum, Terrill's report remains in the purview of admissible expert testimony whereas Kelley's does not, such that Fifth Third cannot tenably ask this Court to strike Terrill's report simply because Kelley offered inadmissible opinions.

7. RLI fully explained why Terrill's opinions are admissible and why Kelley's opinions are inadmissible in its motion to strike (Dkt. 101-102) and reply in support thereof (Dkt. 110). To avoid unnecessary repetition, RLI will incorporate those briefs by reference.

For the reasons set forth herein, RLI asks this Court to deny Fifth Third's Motion, in the Alternative, to Strike the Expert Report of Nancy Terrill, without regard to whether it grants RLI's Motion to Strike Fifth Third Bancorp's Expert Disclosure, and for any other relief the Court deems necessary and appropriate.

RESPECTFULLY SUBMITTED,

/S/ Scott L. Schmookler

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2017, I circulated a copy of the foregoing via the court's electronic filing system to the following:

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